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SUPREME COURT OF THE UNITED STATES

No. 1004

319 U.S. # 17
KEA-LOC

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT

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HILLSBORO PTG. CO., TAMPA

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

Your petitioners, Keal Driveway Company, a corporation, and R. S. Bunnell, pray that a writ of certiorari issue to the United States Circuit Court of Appeals, Fifth Circuit, to review its judgment rendered January 20, 1943 (R. 192), rehearing refused February 12, 1943, reversing judgment of the United States District Court for the Southern District of Florida (R. 39).

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Your petitioners were defendants in an action wherein Car & General Insurance Corporation, as subrogee under the Florida Workmen's Compensation Act, sued on its own behalf and on behalf of Ralph Campbell to recover damages for personal injuries sustained by Campbell in an automobile accident. (R. 1).

The cause coming on for trial, the jury found, in answer to interrogatories submitted to it by the Court, that the defendants were guilty of negligence and likewise Campbell was guilty of contributory negligence (R. 37) and judgment for petitioners was entered under the Florida rule that contributory negligence constitutes a complete defense. (R. 39).

Appeal was taken by the respondent (R. 177), and the Circuit Court of Appeals reversed the judgment by a divided opinion, (R. 186-189) Judge Hutcheson filing a dissenting opinion (R. 190), officially reported in 132 F. (2d) 834), upon the sole ground that the refusal of the lower court to give charges requested by the respondent dealing with the doctrine of sudden emergency was erroneous.

Campbell's testimony, upon which respondent necessarily predicated its right to invoke the emergency doctrine, disclosed he was traveling north and petitioners' vehicles in a southerly direction on a straight 20-foot concrete highway (R. 83), at 10:00 A. M., when the vehicles collided in approximately the middle of the pavement. He

testified that when he was a quarter of a mile distant, he saw petitioners' approaching automobile directly in his pathway (R. 58), running off the pavement and then back on (R. 49); that when it was some 250 or 300 feet distant, he noticed no one was at the wheel (R. 59). He further testified that at no time did he swing his car toward the shoulder or swerve it in any but continued driving straight forward (R. 62, 63) at a speed of 45 to 50 miles per hour (R. 50) until the accident occurred, although he distinctly saw that there was no one at the steering wheel and closely observed the approaching car to see how it was running automatically (R. 60).

There was no testimony which indicated, in the slightest degree, that Campbell at any time considered he was in peril or in any wise changed his speed or course. The evidence clearly negatived the existence of any sudden peril inasmuch as Campbell had been engaged in pondering, out of curiosity, the phenomenon of a self-operating automobile (R. 60). He admitted that during the period subsequent to his observance of petitioners' automobile, a quarter mile away, he took no steps for his own safety and his testimony demonstrates that his conduct was not influenced by terror (R. 58-63).

At the conclusion of respondent's case and also at the close of the entire evidence, your petitioners duly made motion for a directed verdict upon the ground that the evidence disclosed that Campbell was guilty of contributory negligence as a matter of law (R. 119 and 27). The trial Court reserved ruling upon these motions and in view of the jury's finding never had occasion to pass thereon.

III.

JURISDICTION OF THIS COURT is asserted under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statutes 938 (U.S.C.A. Title 28, Sec. 347a).

The opinion of the Circuit Court of Appeals was rendered on the 20th day of January, 1943 (R. 186). Thereafter your petitioners filed a petition for rehearing (R. 193), which was, by order of the appellate court, denied on the 12th day of February, 1943 (R. 199).

Department of Banking v. Pink, 87 L. Ed. 218.

IV.

THE QUESTIONS PRESENTED ARE AS FOLLOWS:

1. Should the jury be instructed on the sudden emergency doctrine when the evidence discloses (a) that the party requesting such charge has by his own negligence contributed to causing the emergency, (b) the conditions which finally culminated in an emergency having been actually observed for an appreciable time, (c) where such party did not apprehend the existence of peril and (d) did not act in extremis, and when the Florida rule, under the stated circumstances, is to the effect that the emergency doctrine is inapplicable.

2. Should instructions on the emergency doctrine be given which fail to include the qualification, required under the Florida law, that such doctrine is applicable only

in the event the emergency had arisen without previous negligence on the part of the party invoking same?

3. Is a person guilty of contributory negligence, as a matter of law, when he voluntarily exposes himself to the unreasonable risk incident to an approaching automobile which he clearly observes is out of control and running without a driver?

4. Where the effect of the decision of the Circuit Court of Appeals is such as to constitute precedent that the emergency doctrine is applicable in every case merely upon proof of the existence of sudden peril, should this Court exercise its supervisory power in order to prevent serious hindrance in the future administration of the law in this state?

V.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The following reasons are relied upon for the issuance of the writ of certiorari:

1. The conclusion, as set forth in the majority opinion, is in direct conflict with the applicable law on the emergency doctrine as enunciated by the Florida Court in the cases of Hainlin v. Budge, 56 Fla. 342, 47 So. 825, and White v. Hughes, 139 Fla. 54, 190 So. 446. It is submitted that the evidence in this case, when viewed in the light of the Florida law, presented no basis whatever for the application of the sudden peril doctrine.

2. The law of this case, as expressed in the majority opinion, is that the defense of sudden emergency is available notwithstanding the emergency resulted from the claimant's previous contributory negligence, inasmuch as the requested instructions contained no qualification that the emergency must have arisen without Campbell's prior negligence. This omission rendered the charges fatally defective under the Florida law and also under the subsequent announcement of the Fifth Circuit Court of Appeals in Shell Oil Co. v. Slade, 133 F. (2d) 519.

3. The evidence, as a matter of law, conclusively established that Campbell was guilty of negligence in voluntarily exposing himself to an unreasonable risk, which negligence proximately contributed to occasioning the accident. The point was presented to the Circuit Court of Appeals which declined to follow the Florida law, as well as the general law, and erroneously held the issue of contributory negligence was for the jury.

4. The decision rendered is of such nature as to call for the exercise of this Court's power of supervision in order to prevent serious hindrance in the future administration of the law in the State of Florida inasmuch as the announcements contained in the majority opinion, when viewed in the light of the facts of the case, necessarily warrant the injection of the issue of sudden emergency in substantially all automobile damage actions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari do issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court for its review and

determination on a day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Circuit Court of Appeals, Fifth Circuit, be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

R. W. SHACKLEFORD
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Shackleford, Farrior & Shannon,
of Counsel.